

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP1234

Cir. Ct. No. 2003CV285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

AMERICAN TRUST & SAVINGS BANK,

PLAINTIFF-RESPONDENT,

**MICHAEL S. POLSKY, RECEIVER FOR COMMUNICATIONS
PRODUCTS CORPORATION,**

RESPONDENT,

V.

COMMUNICATIONS PRODUCTS CORPORATION,

DEFENDANT-APPELLANT,

**DANIEL E. VIRNICH, JACK M. MOORES AND BASIC PRODUCTS
CORPORATION,**

APPELLANTS.

APPEAL from an order of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Appeal dismissed in part; order reversed in part.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 LUNDSTEN, P.J. When this appeal was filed, the central dispute was whether the circuit court properly prohibited Daniel Virnich and Jack Moores, the de facto owners of Communications Products Corporation (CPC), from filing a derivative action on behalf of CPC against American Trust and the receiver, Daniel Polsky.¹ After our review of the record suggested that the appeal might be moot, we held oral argument.

¶2 At oral argument, the parties agreed that this case is moot as it relates to the circuit court's decision to deny Virnich and Moores leave to file a derivative action on behalf of CPC against American Trust and Polsky. The appeal is moot in this respect because, during the pendency of this appeal, the receivership was terminated. Thus, Virnich and Moores, in their ownership role,

¹ Throughout this opinion, we use "Virnich and Moores" as a shorthand reference to both these individuals and their stock holding company, Basic Products Corporation. We are told that Basic Products Corporation owns all of the stock of CPC and that Virnich and Moores own Basic Products. The parties give us no reason to think that there is a difference between the positions of these individuals and their holding company. Thus, for example, if a document or transcript contains a reference to Basic Products, we will nonetheless treat the reference as being to Virnich and Moores, unless otherwise indicated.

Also, it appears that certain trusts have some sort of ownership role in CPC, but there is no suggestion by the parties that the existence of the trusts matters. Accordingly, we ignore the trusts for purposes of this opinion.

no longer need the receivership court's permission to act with respect to bringing a derivative claim because, simply put, there is no longer a receivership.²

¶3 Turning from the question of a potential derivative action by Virnich and Moores to the portion of the circuit court's order that purports to prohibit CPC from filing a direct action against American Trust and Polsky, it does not appear to us that the circuit court actually intended to prohibit CPC itself from filing a direct action against any party. However, at oral argument the parties agreed that the circuit court's decision does prohibit CPC from filing suit against American Trust and Polsky and, therefore, we will assume that that is true for purposes of this opinion.³

¶4 Consequently, we work from the premise that the circuit court's order prohibits CPC from suing American Trust and Polsky, and we address the propriety of that part of the order. In this respect, we conclude that the order incorrectly decides that CPC has forfeited its right to bring a suit for damages against either American Trust or Polsky.

¶5 Accordingly, we deem this appeal moot as to appellants Virnich and Moores, and that portion of the appeal is dismissed. As to appellant CPC, we reverse the order for the reasons explained below.

² At the time we issued the order for oral argument, the appellate record contained an order suggesting that the receivership may have been terminated in May 2011. After we held oral argument in August 2012, the parties supplemented the record with an order showing that the receivership had actually been terminated on May 29, 2012.

³ We understand American Trust's position to be that the order *effectively* bars CPC from suing American Trust because, even if the order does not actually prohibit CPC from filing suit against American Trust, such a suit would have to be dismissed based on claim or issue preclusion.

Background

¶6 American Trust is a bank that loaned large amounts of money to CPC over several years. In an ex parte motion based on allegations in a complaint filed June 3, 2003, American Trust sought the appointment of a receiver. American Trust alleged that CPC was insolvent or in imminent danger of insolvency. That same day, the circuit court entered a temporary order appointing attorney Michael Polsky as receiver.

¶7 On June 17, 2003, attorneys representing Virnich and Moores and CPC filed an objection to the receivership. Before the circuit court ruled on this objection, the parties reached an agreement intended to facilitate the sale of CPC's assets. As part of that agreement, reached on September 9, 2003, the objection to the receivership was withdrawn. The circuit court subsequently approved the agreement, and the receiver apparently sold most or all of CPC's physical assets.

¶8 In February 2011, the circuit court ruled that CPC and Virnich and Moores had forfeited their right to sue American Trust and Polsky. Leading up to this decision, starting no later than September 2003, several hearings and other events took place that we will now reference in broad terms, summarizing more detail later in this opinion. For now, it is sufficient to say that, after the asset sale, much of the remaining business of the receivership involved dealing with disputes between American Trust and Virnich and Moores. Most significant for purposes of this case are two items.

¶9 First, the receiver, Polsky, authorized a lawsuit against Virnich and Moores. That suit was filed and tried before a judge different from the judge in this receivership action. The jury in that case found against Virnich and Moores.

Our decision on appeal in that case is *Polsky v. Virnich*, 2010 WI App 20, 323 Wis. 2d 811, 779 N.W.2d 712.

¶10 Second, in this receivership action, attorneys representing Virnich and Moores and CPC took steps in an attempt to cause a suit to be filed against American Trust, either at the direction of Polsky or by means of a derivative action filed by Virnich and Moores. In later years, the topic of a suit against Polsky was broached. In 2010, as an outgrowth of disputes in this regard, American Trust asked the circuit court to find that Virnich and Moores and CPC had forfeited their right to pursue a suit against American Trust.

¶11 On February 21, 2011, the circuit court ruled that:

CPC, Virnich and Moores, have waived their right to seek damages against [American Trust] for the alleged filing of inaccurate documentation to support the appointment of the Receiver in this case, and against the Receiver [Polsky] for actions taken prior to the September 2003 Agreement.

This is the order that is the subject of this appeal.

¶12 We pause here to note that, although the parties and the circuit court use the term “waiver,” their arguments and the court’s analysis are plainly a matter of forfeiture. In *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, our supreme court clarified that forfeiture is the failure to make the timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. *Id.*, ¶29. Although CPC quotes from case law speaking of waiver as the “voluntary and intentional relinquishment of a known right,” we do not understand CPC to be seriously disputing American Trust’s assertion that the applicable test is found in *Home Bank v. Becker*, 48 Wis. 2d 1, 179 N.W.2d 855 (1970). And, the analysis in *Home Bank* did not involve

determining whether a person voluntarily and intentionally relinquished a known right. *See id.* at 9-11. Moreover, the circuit court here did not rely on the concept of a knowing waiver. Accordingly, in this opinion, we will substitute the term “forfeiture” for the term “waiver” when discussing the circuit court’s order and the parties’ arguments.

Standard Of Review

¶13 The general rule is that the application of forfeiture law to undisputed facts is a legal question that we decide without deference to the circuit court. *See Meyer v. Classified Ins. Corp. of Wis.*, 179 Wis. 2d 386, 396, 507 N.W.2d 149 (Ct. App. 1993) (“[T]he application of the facts to a legal standard, such as waiver, is a question of law that we review independently of the trial court.”). The parties agree that this general rule applies here.

Discussion

¶14 This is a case with a fairly simple bottom line, but getting to that bottom line is complicated by (1) the volume of activities relating to the receivership here, (2) the lack of briefing on various receivership issues, (3) the lack of distinct forfeiture arguments regarding a possible suit against Polsky, (4) the lack of differentiation by all parties—both before the circuit court and before this court—between the actions taken by counsel on behalf of Virnich and Moores as CPC owners and the actions taken by counsel on behalf of CPC, and (5) the lack of differentiation in many discussions—both before the circuit court and before this court—between efforts to terminate the receivership, including any effort to undo receivership actions, and the distinct effort to initiate a lawsuit for damages against American Trust and, later, Polsky based on the alleged harm CPC suffered as a consequence of the receivership.

¶15 Thus, before turning to the merits of the remaining forfeiture dispute, we attempt to provide some clarifications.

I. Preliminary Clarifications

A. Clarification With Respect To Polsky

¶16 CPC asserts that it is interested in suing Polsky because of information uncovered showing that Polsky knew or should have known that an affidavit, submitted in support of American Trust's request for a receivership, contained false and misleading information. And, on its face, the circuit court's order prohibits CPC from suing Polsky. However, a separate discussion of forfeiture with respect to Polsky is problematic because the parties have not provided distinct discussions of Polsky as the target of a possible claim for damages. Moreover, not much light was shed on this topic during oral argument. Indeed, although represented at oral argument, Polsky did not file a separate appellate brief, instead opting to join the brief filed on behalf of American Trust. This is at least potentially a problem because American Trust and Polsky are not in the same position for purposes of this appeal.

¶17 For example, the circuit court's forfeiture reasoning focuses on events and omissions during 2003, 2004, and 2005. But we find no indication that a suit against Polsky was an issue during this time period. Notably, at an October 27, 2003 hearing, counsel for CPC disclaimed any current concern about Polsky doing anything improper. And, when Virnich and Moores filed their 2005 motion for leave to file a derivative action on behalf of CPC, the request covered only a suit against American Trust. Perhaps more significantly, we see no indication, during the early years of this dispute, that either Virnich and Moores or CPC had information suggesting there were grounds to sue Polsky.

¶18 We are uncertain, but based on our independent review of the record and the appellate briefing, it appears that CPC was first apprised in 2008 of the possibility of misconduct by Polsky relating to the initiation of the receivership. CPC points to a response to discovery, produced in May 2008, that allegedly indicates possible improper cooperation between Polsky and American Trust leading up to the appointment of Polsky as receiver. The precise point after 2005 that CPC obtained information suggesting that Polsky might have played an improper role in initiating the receivership is not critical for our purposes. Rather, our point here is that most of the forfeiture arguments made by American Trust do not appear to apply to Polsky. And, we find no support for a forfeiture determination against CPC with respect to Polsky in the trial level forfeiture briefing or in the circuit court’s explanation of its order declaring forfeiture with respect to Polsky.

¶19 We note that there may be other reasons why a suit against Polsky might be barred or fail. At oral argument, Polsky’s counsel contended that “to the extent that the receivership action has been concluded and the receiver has been discharged, the action against the receiver could not proceed because it has to be brought within the jurisdiction of the court that appointed the receiver.” Polsky’s counsel seemed to say that such an action must be brought within the context of the receivership action because, in counsel’s words, “the receiver’s response to claims brought by participants in a receivership proceeding are responded to by the assets of the receivership estate, and not the receiver’s individual personal assets.” But these comments were brief and not intended to supplant developed argument. Thus, we have no developed argument on alternative arguments that might support barring CPC from suing Polsky for damages.

¶20 It follows that we have no meaningful basis to separately discuss forfeiture with respect to a suit against Polsky and, for the most part, the remainder of our discussion is directed at forfeiture with respect to a claim against American Trust. Nonetheless, it should be clear by the end of our discussion that there is no reasonable basis that supports a determination that CPC forfeited any right it may have to sue Polsky for damages.

B. Clarification With Respect To Legal Aspects Of Receiverships

¶21 Our discussion contains some assumptions about legal aspects of receiverships. We do not think that these assumptions are disputed. Still, we were appropriately cautioned by Polsky's counsel during oral argument that it is easy to inadvertently make statements about receiverships that do not comport with established receivership law or that are otherwise inconsistent with the proper development of such law. Thus, based strictly on explicit or implicit positions advanced by the parties in this case, we set forth some of the assumptions we make, with the caveat that we do not opine on the legality of these assumptions:

- Once the receivership was in place, the receiver controlled all of the assets of CPC.
- The assets of CPC included any legal claims CPC might have, including claims against American Trust and Polsky.
- CPC had legal representation apart from the receivership and could have, through counsel, asked the receivership court for permission to act apart from the receivership.
- The attorneys representing Virnich and Moores in their capacity as owners also represented CPC.
- Attorneys acting on behalf of CPC and Virnich and Moores could not file suit against American Trust unless at least one of the following occurred:

- Polsky authorized the attorneys to file a direct action.
- Polsky abandoned a claim against American Trust, either voluntarily or per court order.
- The circuit court issued an order authorizing attorneys for CPC to file a direct action.
- The circuit court authorized a derivative action to be filed by Virnich and Moores on behalf of CPC.
- The circuit court order, issued in the context of this receivership action, affects CPC's right to file an action after termination of the receivership.

¶22 Although we rely on these assumptions for purposes of discussing the events in this case, none of the specifics of these assumptions affect the outcome here. Also, as to these and other assumptions regarding legal rights and obligations relating to receiverships, our opinion should carry no weight in cases that do not involve the parties and the dispute in this appeal.

*C. Clarification With Respect To Differentiating CPC From Virnich
And Moores In Their Role As CPC Owners*

¶23 As noted above, in argument before the circuit court and this court, there has been a failure to differentiate actions taken by counsel on behalf of Virnich and Moores as CPC owners and actions taken by counsel on behalf of CPC. For example, two key events in this case are the filing and the withdrawal of the objection to the receivership in 2003. The parties appear to agree that we should speak in terms of CPC as having both filed and withdrawn the objection. But the documents show that the objection was filed solely by CPC, and the

withdrawal of the objection was accomplished by Virnich and Moores' holding company, Basic Products Corporation.⁴

¶24 Another example of a lack of differentiation is found in circuit court briefing submitted by American Trust in 2010. In that briefing, American Trust asserted that CPC and "its principals" Virnich and Moores should not be permitted "to pursue a 'derivative' action" against American Trust. However, American Trust's ensuing discussion focuses entirely on Virnich and Moores' attempt, acting as CPC owners, to bring a derivative action on behalf of CPC and why it would be unfair to permit Virnich and Moores to bring a derivative action at such a late date. None of the three memorandums submitted by American Trust on this topic contain a recognizably distinct discussion of CPC's actions or inaction or whether CPC should be deemed to have forfeited its right to bring a *direct* action.⁵

⁴ Daniel Virnich signed the agreement withdrawing the objection on behalf of various trusts and Basic Products. The only signature on behalf of CPC is Polsky's.

⁵ American Trust's focus on the derivative claim effort by Virnich and Moores is also exemplified in the following extended quote from American Trust's appellate brief-in-chief:

Another important point that Appellants [CPC and Virnich and Moores] attempt to gloss over in their brief is that if the Receiver's appointment cannot be challenged, Appellants' "derivative" claim fails as well, for the simple reason that the claim is based on the allegedly "wrongful" appointment of the Receiver. Judge VanDeHey [in *Polsky v. Virnich*] rightly recognized this was the case, and it serves as the basis for his decision to determine that both the objections to the Receiver and the related "derivative" claim were waived.

The fact that the derivative claims are necessarily premised on the Receiver's appointment is confirmed by a moment's perusal of Appellants' August 12, 2005 motion for a derivative action. This document alleges that American Trust and the Receiver wrongfully sought the Receiver's appointment through an affidavit that is supposedly inaccurate as to CPC's financial condition. Appellants' second motion to pursue the

(continued)

¶25 We gleaned from oral argument and a letter submitted after oral argument that the parties agree that all arguments and actions of the attorneys representing either Virnich and Moores or CPC, or both, whether stated in terms of the derivative action or not, should be treated as arguments and actions relevant to the determination of whether CPC forfeited its right to bring a direct action. Similarly, we understand the parties to agree that the arguments of attorneys representing American Trust, even when expressly directed solely at Virnich and Moores' effort to bring a derivative action, should be treated as arguments directed at CPC's right to bring a direct action. As a practical matter, this agreement makes sense.

¶26 This is because CPC, obviously, cannot communicate directly with its attorneys. Rather, CPC communicates through Virnich and Moores in their role as corporate officers, as distinct from their role as owners. Thus, to the extent the corporation could act independently of the receiver, it would have been at the direction of Virnich and Moores. And, we perceive no meaningful difference, for

derivative claim, dated August 6, 2007, again stated allegations revolved around the allegedly "false" affidavit. In fact, the same allegations are included in Appellants' brief in this appeal, at 21-24, and again claim that the affidavit stating that CPC was insolvent or in imminent danger of insolvency was purportedly "false."

Because the derivative claims are based on a purportedly improper appointment of the Receiver, it follows that if the Receiver's appointment is proper, or at least if any objection has been waived at this point, Appellants' "derivative" claims are mooted. In fact, the Seventh Circuit reached a logically identical conclusion in rejecting, on issue preclusion grounds, the "derivative" claims when Virnich attempted to cast them as a "conspiracy" claim under Wis. Stat. § 134.01 in his federal action.

(Record citations omitted.)

purposes of this appeal, between a claim against American Trust for damages brought directly by CPC and the same claim brought as a derivative action on behalf of CPC.

¶27 For that matter, no other approach makes sense when viewed in light of our assumption that the circuit court intended to prohibit a direct action against American Trust. Like us, the circuit court had before it no distinct forfeiture argument directed at CPC's failures. Thus, if the circuit court intended to rule that CPC forfeited its right to pursue a direct action, the court must have done so by ignoring the problems we discuss in this subsection and elsewhere.

¶28 Accordingly, for the most part, in the factual and legal discussions that follow we will speak in terms of CPC or its attorneys acting, even though some of these actions were plainly taken solely by or on behalf of Virnich and Moores in their capacity as CPC owners. Additionally, when we do speak in terms of Virnich and Moores acting in an effort to bring a derivative action, we hope it will be apparent that, to the extent our discussion supports the view that Virnich and Moores did not forfeit the right to seek permission to bring a derivative action, such discussion likewise demonstrates problems with forfeiture with respect to a direct action by CPC.

D. Clarification With Respect To The Nature Of The Claim At Issue

¶29 Much of the confusion, both before the circuit court and this court, can be traced to a lack of differentiation between efforts to terminate the receivership, including any effort to undo receivership actions, and the distinct effort to initiate a lawsuit for damages against American Trust based on the alleged harm CPC suffered as a consequence of there being a receivership. In this

subsection, we clarify that the only remaining type of claim at issue here is one seeking damages resulting from the receivership.

¶30 The receivership has been terminated and, therefore, regardless of the circuit court's intent, any effort by CPC now to terminate the receivership is moot. Thus, while CPC interspersed its quest for damages with efforts to halt the receivership or replace the receiver, the only question at this point is whether CPC has forfeited its right to seek damages against American Trust.⁶

¶31 American Trust has argued, in various ways, that when CPC dropped its effort to halt the receivership in 2003, it forfeited its right to later seek damages resulting from the existence of the receivership. This argument rests on the notion that there is an inconsistency between withdrawing an objection to a receivership, thereby agreeing to allow the receivership to proceed, and then later seeking damages based on the proposition that the receivership should never have been put in place. However, at oral argument, counsel for American Trust conceded that there is no such inconsistency. This concession is appropriate.

¶32 There is no inconsistency in CPC both stepping aside to allow the receiver to act so that the asset sale could go through and CPC then later seeking damages because there never should have been a receivership in the first instance. CPC asserts that it withdrew its objection to the receivership to allow for a prompt asset sale before the assets lost even more value. We discern no factual disagreement on this point. Attempting to mitigate losses stemming from alleged

⁶ During oral argument, counsel for CPC affirmed that CPC is solely interested in bringing a suit for damages.

misconduct is *compatible* with asserting a claim that you should not have been forced into the position of needing to mitigate losses in the first place.

¶33 We stress that we have no reason to address the underlying merit of suits for damages against American Trust or Polsky. There is much back and forth in the record and in the briefing on appeal as to whether there is any possible merit to allegations that either American Trust or Polsky acted improperly or, if so, whether CPC suffered financial harm as a result. Such discussions were often relevant before the circuit court when that court was asked to make decisions in its supervisory role over the receiver. For example, the circuit court’s view that a jury verdict against Virnich and Moores, in a separate action brought by Polsky, “tilts the scales of equity heavily in [American Trust’s] favor” might have been relevant when the question was whether the circuit court should, in the context of an ongoing receivership, authorize either a direct or derivative action against American Trust. But the jury verdict in that separate case sheds no light on whether CPC sat on its hands and should therefore be held to have forfeited its claims.

¶34 With these clarifications in mind, we now recite what we understand to be the most pertinent facts. In keeping with our discussion above, we acknowledge that some of the language that we use to refer to CPC and to Virnich and Moores is, strictly speaking, inconsistent with the record.

II. Additional Background Facts

¶35 As noted above, American Trust, acting *ex parte*, initiated receivership proceedings on June 3, 2003. That same day, the circuit court entered a temporary order appointing Polsky as receiver.

¶36 On June 17, 2003, the attorneys representing CPC filed an objection to the receivership, asserting that CPC was not insolvent or in imminent danger of insolvency and that American Trust had submitted a false and misleading affidavit to the contrary. The objection asked the court to “deny [American Trust’s] request for the appointment of a [permanent] receiver.”

¶37 According to the circuit court, because of “time constraints and scheduling difficulties,” it did not rule on the objection to the appointment of a receiver before the objection was withdrawn as part of an agreement reached on September 9, 2003. As we have already noted, this agreement was intended to facilitate the sale of CPC’s assets. The withdrawal of the objection was accomplished by the following language:

BPC withdraws the objection ... filed on behalf of CPC to the appointment of Michael Polsky as receiver for CPC in [this case], and agrees not to object to the Receiver’s authority to sell, assign, transfer and convey the assets as set forth in the Receiver’s “Motion to Sell All Equipment, Accounts Receivable, Inventory, Intangible Assets and Real Estate of Communications Products Corporation and for Certain Other Relief” as modified by the terms of this Agreement.

¶38 The agreement purported to resolve several disputes, but it is silent as to any claim for damages that Virnich and Moores or CPC might have against American Trust.

¶39 On September 10, 2003, the circuit court entered orders making Polsky’s appointment as receiver permanent and approving the agreement and asset sale. The particulars of the asset sale do not matter for purposes of this appeal, but it appears that the sale involved assets that were necessary for a potential purchaser to operate the business as a going concern. We understand Polsky to have taken the position that unsold assets included a cause of action

against Virnich and Moores and, in particular, an allegation that Virnich and Moores owed CPC “in excess of \$750,000.”

¶40 One month later, on October 9, 2003, Polsky sought court approval for a financing agreement between CPC and American Trust. The apparent purpose of this agreement was to enable American Trust to fund the receivership and thereby assist Polsky in his effort to recoup money for CPC from Virnich and Moores which, in turn, would be passed through to CPC’s main creditor, American Trust.

¶41 Pertinent here, the draft agreement contained a provision in which CPC agreed to release all claims against American Trust. Counsel, on behalf of CPC, objected and asserted that, “[b]ased on [American Trust’s] behavior in this action, including its use of a false and misleading affidavit to obtain the temporary appointment of a receiver on an ex parte motion (which resulted in a substantial reduction of CPC’s going concern value), CPC would appear to have valid claims against [American Trust].”

¶42 At a hearing on October 27, 2003, American Trust informed the court that it had no objection to striking the release of claims language. Counsel for American Trust stated that American Trust “is willing to have [claims against it] looked at if anyone in the case feels it is appropriate to look at it.” The circuit court struck the release of claims language and expressed its understanding that the receiver was going to investigate potential claims that CPC might have against American Trust.

¶43 In May 2004, Polsky caused a claim to be filed against Virnich and Moores. This suit involved allegations that Virnich and Moores, in their roles as officers of CPC, breached their fiduciary duties by taking excessive compensation

and otherwise taking actions to benefit themselves personally at the corporation's expense. *Polsky*, 323 Wis. 2d 811, ¶4. This separate lawsuit is significant here because, factually, the lawsuit intertwines with the allegations of Virnich and Moores that CPC was not facing insolvency and that American Trust caused CPC to lose value by misrepresenting CPC's financial condition and prompting the circuit court to appoint a receiver. We will refer to this separate case as *Polsky v. Virnich*.

¶44 The topic of Polsky's failure to pursue CPC's assertion—that the receivership was initiated based on a false and misleading affidavit—was discussed at a hearing on July 14, 2005. Counsel for Virnich and Moores explained that Polsky was effectively funded by American Trust and that American Trust was not interested in funding an investigation against itself.⁷ Polsky explained that there were no funds in the receivership because, when money came in, it was immediately paid to American Trust under a prior financing agreement approved by the circuit court. To solve this funding problem, counsel for Virnich and Moores suggested that Virnich and Moores would fund an investigation against American Trust, with any resulting proceeds going to CPC. Polsky added that he thought that, if there was a recovery from such an effort, the proceeds could first go to reimburse Virnich and Moores for funds expended. Notably, at this 2005 hearing, although the topic was whether CPC might recover damages from American Trust because of misconduct relating to the initiation of

⁷ At oral argument, counsel for Polsky, without referencing any specific time frame, stated that Polsky made it clear to everyone that he had no money to investigate a claim against American Trust.

the receivership, counsel for American Trust did not suggest that such a claim had been forfeited. To the contrary, counsel stated:

We don't have a problem with a special counsel being appointed to do an investigation. We don't believe that there are any valid claims against the bank, but we are not going to fund this.

I have no objection to Mr. Polsky's proposal, which is Mr. Virnich and Mr. Moores fund the funds; and if there is a claim and it is pursued and a recovery, [Virnich and Moores] are entitled to reimbursement first.

The circuit court then expressed its understanding that there now could be a receivership investigation of American Trust funded by Virnich and Moores. Counsel for Virnich and Moores then suggested that funding an investigation in this manner would add an additional layer of expense and that it would be preferable if the circuit court authorized a derivative action. Polsky responded that he had offered to retain an independent counsel at Virnich and Moores' expense to analyze a claim against American Trust and, if Virnich and Moores wanted to file a derivative action, they should file a motion so that the issue could be briefed. The hearing ended with the circuit court directing counsel for Virnich and Moores to file such a motion.

¶45 On August 12, 2005, Virnich and Moores moved for leave to file a derivative action on behalf of CPC against American Trust for instituting the receivership based on a false and misleading affidavit. Counsel for CPC and Virnich and Moores asserted that CPC was entitled to damages caused by the receivership, "including the loss of a major injection molding licensing agreement, loss of CPC's customer base, and damage to its valuable supplier relationships." Virnich and Moores contended that the receiver had not pursued a claim to this effect against American Trust and, therefore, a derivative claim was necessary. In

its brief objecting to the motion, American Trust agreed with Polsky's proposal that any claims against American Trust should be investigated and pursued by an independent party.

¶46 At a hearing on October 10, 2005, the circuit court stated that there were disputed facts and that further investigation was merited. The court did not deny the motion for leave to file a derivative action, but it did note that Virnich and Moores had agreed to fund an investigation and the court directed "each party" to submit the name of a proposed "independent counsel." The court stated that if an independent counsel "indicates that there is a valid claim then [independent counsel] will be empowered to file a derivative action and pursue this matter."

¶47 Subsequently, Polsky and Virnich and Moores agreed that Attorney Tim Dixon would explore a possible claim by CPC against American Trust and report back to the circuit court whether CPC had a "viable" claim. On May 20, 2006, Attorney Dixon issued a report determining that a complaint against American Trust would survive a motion to dismiss, but opining that a receiver would not file such a complaint because there "is currently little to no benefit to general unsecured creditors."

¶48 The record reflects that the topic of a possible action by CPC against American Trust was discussed with the circuit court multiple times between 2005 and 2010. In each instance we have located, it was assumed that CPC had the right to sue American Trust for damages for improperly initiating the receivership. The dispute in these discussions did not involve whether such an action could be brought, but rather *how* and *whether* the action should be brought. The following are examples:

- At a hearing on June 30, 2006, scheduled to determine whether the derivative action would be allowed to proceed based on Attorney Dixon's report, Polsky suggested that the circuit court defer a decision until after the jury verdict in *Polsky v. Virnich*. Polsky also suggested that CPC could sell its claim against American Trust to the highest bidder and that American Trust could be one of the bidders. The circuit court did not decide whether the derivative action should proceed or whether CPC's claims against American Trust should be put out for bid. Instead, the court directed the parties to attempt to agree on a bidding process.
- At a hearing on August 10, 2006, the circuit court stated that the information before it, now including a report from a second expert, suggested that CPC had a non-frivolous claim against American Trust regarding the initiation of the receivership. The circuit court concluded that a bidding process was appropriate, but bidding should not take place until after the jury verdict was reached in *Polsky v. Virnich*. The circuit court and the parties apparently believed that the jury's resolution of factual disputes in *Polsky v. Virnich* would shed light on the value of a derivative claim against American Trust. Thus, in effect, the circuit court authorized a derivative action against American Trust but made that authorization contingent on an as yet unresolved bidding process and the result of the trial in *Polsky v. Virnich*.⁸
- At a hearing on May 7, 2008, the topic was discovery "with respect to valuating claims that CPC may have against the bank." Indeed, at this hearing the receiver, Polsky, stated: "Attorney Schott and I entered into a stipulation that until the Court of Appeals rendered its decision in the litigation which I commenced against Mr. Virnich and Mr. Moores, this question of what happens to the derivative suit

⁸ In November 2006, the jury in *Polsky v. Virnich* returned a verdict against Virnich and Moores that awarded CPC 6.5 million dollars in damages. Virnich and Moores appealed the judgment in that case. We will not recount the complicated appellate history of that case. It is sufficient to say here that the judgment was reversed, and the matter was not finally resolved until after issuance of the challenged circuit court order in this case.

would be put on hold.... Clearly, this discovery relates to what happens with the derivative claim that we have agreed should be put on hold.” As it stood at the end of this hearing, the circuit court ordered Polsky to cooperate with discovery and the parties believed that an appellate court decision in *Polsky v. Virnich* might affect the viability of a claim against American Trust.

¶49 So far as we can discern, the first time the topic of forfeiture regarding a claim against American Trust was brought up was during a hearing on November 3, 2010.⁹ At this juncture, the circuit court explained that it scheduled a hearing because the supreme court had accepted review in *Polsky v. Virnich* and “who knows when a decision will be forthcoming.” The circuit court stated that it appeared that “regardless of how [*Polsky v. Virnich*] is resolved ... [CPC] or Mr. Virnich and Mr. Moores plan on pursuing their counterclaims against [American Trust].” Counsel for CPC argued that something should be done in the receivership action regarding the allegation that American Trust misled the court when persuading it to appoint a receiver. Polsky contended that the matter should still await a decision by the supreme court because a decision in that case “could have a direct impact on the merits of [CPC’s claim against American Trust]” should the supreme court reinstate the verdict against Virnich and Moores. Counsel for CPC then appears to have attempted to clarify that he was suggesting that the court revisit the topic of the propriety of the appointment of the receiver because that might result in terminating the receivership, thus freeing up CPC to file a direct action against American Trust. Responding to CPC’s apparently renewed effort to terminate the receivership, counsel for American Trust argued,

⁹ American Trust claims to have argued forfeiture in a motion filed on June 14, 2007. This is true, but the forfeiture argument American Trust points to is directed at an issue CPC has abandoned, namely, CPC’s intermittent effort to remove Polsky as receiver. This is not an issue on appeal.

in effect, that CPC and Virnich and Moores stipulated—a clear reference to the September 9, 2003 agreement—that they were no longer fighting the appointment. After hearing argument from the parties, the circuit court ordered briefing “indicating that legally this matter’s been decided and it’s either been a waiver or decided and shouldn’t be brought up again.” Unfortunately, this directive failed to distinguish between the effort to terminate the receivership and the effort to cause a suit to be filed against American Trust.

¶50 After this hearing, the parties submitted briefing. Focusing on the actions and inactions of Virnich and Moores, American Trust’s briefing argued that CPC and Virnich and Moores had forfeited any claim against American Trust. American Trust’s circuit court briefing made essentially the same arguments that American Trust makes on appeal.

¶51 Following briefing, the circuit court, on February 21, 2011, addressed American Trust’s forfeiture argument. In keeping with American Trust’s framing of the issue in its briefing, the circuit court focused on Virnich and Moores’ attempt to bring a derivative action. The court wrote:

The issue before the court is *whether Virnich and Moores are estopped from pursuing a derivative lawsuit on behalf of CPC against the plaintiff for alleged falsehoods in the documents filed in support of the initial appointment of the Receiver.*

(Emphasis added.) Likewise, the circuit court’s reasoning is directed at Virnich and Moores. The circuit court’s reason for finding forfeiture has two parts.¹⁰

¹⁰ We list only the reasoning the circuit court provided in its discussion section. Other reasons for and against forfeiture appear in an introductory section setting forth the parties’ arguments, but there is no indication that the court relied on additional reasons in the introductory

(continued)

¶52 Regarding delay, the court’s analysis consists entirely of a general comment about the substantial amount of time that had passed and the more specific statement that it was “most concern[ed]” with “Virnich and Moores’ delay in filing for leave to commence a derivative action between” the time of the September 9, 2003 agreement and August 2005.

¶53 The other reason supplied by the circuit court does not address delay, but rather the potential merit of a claim against American Trust. The circuit court considered the jury’s verdict in *Polsky v. Virnich* and wrote:

The jury’s finding in [*Polsky v. Virnich*] that Virnich and Moores should be held liable to the creditors of CPC for over 6.5 million dollars due to inappropriate dealings, tilts the scales of equity heavily in [American Trust’s] favor ... [because] it is the clearest indication that [American Trust’s] concern over the financial situation at CPC was warranted. Even assuming [American Trust] “jumped the gun” and CPC would prevail in a derivative action, the proponents of the action, Virnich and Moores, can hardly claim clean hands. The jury verdict was overturned because it was based upon a theory of liability not supported by Wisconsin law given that CPC was a “going concern” at the time of the malfeasance. That does not change the fact that after listening to a week’s worth of testimony, a jury concluded Virnich and Moores had inappropriate financial dealings with CPC to CPC’s detriment and the detriment of its creditors in an amount of 6.5 million dollars.

section. To the extent these are arguments made by American Trust on appeal, we address them elsewhere in this opinion.

We also note that, although the circuit court suggests that it might analyze whether CPC and Virnich and Moores “waived” the right to pursue claims against American Trust when they withdrew their objection to the receivership to permit the asset sale to move forward, the court did not then go on to suggest that the court considered the withdrawal of the objection to be a “waiver.”

¶54 At the same time, the circuit court acknowledged the obvious—that “Virnich and Moores intended to reserve their right to file claims against” American Trust and that this intent was acknowledged by Polsky. The court found that this “factor weighs heavily in favor of a finding that there has been no waiver, but is not determinative.”

¶55 Although we find nothing in American Trust’s circuit court briefing or the circuit court’s decision separately addressing whether CPC should be held to have forfeited a direct claim against American Trust or substantively addressing forfeiture with respect to Polsky,¹¹ the circuit court included both CPC and Polsky when it broadly ruled:

CPC, Virnich and Moores, have waived their right to seek damages against [American Trust] for the alleged filing of inaccurate documentation to support the appointment of the Receiver in this case, and against the Receiver for actions taken prior to the September 2003 Agreement.

¶56 With these facts in mind, we turn our attention to forfeiture and American Trust’s alternative arguments.

III. Whether CPC Forfeited Its Right To Sue American Trust For Damages

A. Overview

¶57 Generally speaking, the purpose of the forfeiture rule is to encourage parties to deal with an issue when it is judicially efficient to deal with it, as opposed to “sandbagging.” See *Ndina*, 315 Wis. 2d 653, ¶30 (discussing the purpose of the forfeiture rule, including avoiding sandbagging and avoiding

¹¹ Polsky did not submit a brief in the circuit court on the forfeiture issue.

unnecessary disruption to the judicial process). Apart from the case law we discuss below, the parties do not direct our attention to authority that more specifically defines or discusses forfeiture.

¶58 As our recitation of facts above makes clear, when it comes to CPC's assertion that American Trust acted improperly when it initiated the appointment of a receiver, CPC did not sit idly by. Rather, CPC consistently took steps inconsistent with forfeiture, including:

- CPC promptly objected to the circuit court's decision to appoint a receiver, alleging that American Trust had submitted a false and misleading affidavit.
- Shortly after agreeing to withdraw its objection to the receivership, CPC objected to a financing agreement that would have released claims that CPC might have against American Trust, specifically referring to CPC's claim that American Trust acted improperly in requesting the appointment of a receiver.
- CPC complained in 2005 that Polsky was not pursuing the claim and suggested that Polsky's funding problem could be solved by Virnich and Moores supplying funding for an investigation against American Trust.
- CPC (really, of course, Virnich and Moores) moved for leave to file a derivative action.
- CPC cooperated with Polsky to identify an attorney to explore a possible claim against American Trust.
- CPC cooperated with a proposal to conduct a bidding process to sell the claim against American Trust.
- CPC complained in 2008 that Polsky was not cooperating with discovery regarding a suit against American Trust.

¶59 Consistent with these events, both American Trust and the circuit court repeatedly acknowledged that the viability of a suit against American Trust was a live issue. This acknowledgment came in the form of participating in and responding to statements and arguments regarding how such a suit might be brought and whether such a suit should be brought.

¶60 As recounted above, the first time someone suggested that CPC had waited too long to bring suit was at a hearing in 2010. And, even then, the actual discussion concerned Virnich and Moores in their role as CPC owners. And, at this late date, Polsky was still recommending that a court decision on whether to authorize such a suit should await final decision by the supreme court in *Polsky v. Virnich*.

¶61 Having affirmatively explained why the record does not support the circuit court's forfeiture conclusion, we turn to specific arguments made by American Trust.

B. Whether The September 2003 Agreement Is A Reason To Declare That CPC Forfeited A Claim For Damages Against American Trust

¶62 American Trust argues that it matters that, in the September 2003 agreement, CPC withdrew its objection to the receivership. We disagree.

¶63 American Trust's arguments in this respect conflate the two distinct topics we clarified above: (1) attempts to halt the receivership or undo receivership actions and (2) attempts to bring a claim for damages based on the assertion that there should never have been a receivership in the first place. For example, American Trust asserts:

Appellants' decision to withdraw [their objection to the receivership in September 2003] and not pursue their

objections to the Receiver, and to stipulate to the sale of CPC's assets, means that they have at this point waived their ability to challenge the Receiver's appointment and make "derivative" claims based on that same appointment.

This assertion may have some validity if the topic was whether CPC could bring a suit challenging actions taken by Polsky to which CPC did not promptly object and maintain its objection. But that is not the topic. And as we explain in ¶¶31-32 above, there is no inconsistency in CPC both stepping aside to allow the receiver to act so that the asset sale could go through and CPC then later seeking damages because there never should have been a receivership in the first place.

¶64 American Trust argues that when CPC withdrew its objection to the receivership, thereby affirmatively acting to allow the receivership to proceed, CPC's actions were analogous to those of the complaining party in *Home Bank*, 48 Wis. 2d 1. However, *Home Bank* does not address a scenario similar to the one here.

¶65 *Home Bank* deals with a straightforward situation of a party participating in a receivership while raising no objection, waiting to see the result, and then complaining about that result. In *Home Bank*, a creditor bank petitioned the court for the appointment of a receiver under ch. 128, and the debtor "received notice of an order to show cause why a receiver should not be appointed." *Id.* at 4, 9. At a hearing one week later, the debtor appeared and raised no objection to the appointment of a receiver. *Id.* at 9. Nine days later, a receiver was appointed. *Id.* at 4. Thereafter, the debtor participated in the receivership proceedings and the debtor's property was eventually sold. After the sale, and approximately one year after the appointment of the receiver, the debtor moved to have the order appointing the receiver set aside. *Id.* at 9-10. The circuit court denied the motion, and the supreme court affirmed denial for a variety of reasons, including

forfeiture. As to forfeiture, the *Home Bank* court concluded, in essence, that the debtor could not sit silently by, participate in the receivership proceedings for a year, and then attack the validity of the receivership. *See id.* at 10-11.¹²

¶66 If the issue here was whether CPC is still able to bring an action to set aside the asset sale or otherwise undo actions taken by the receiver, we might agree with American Trust that *Home Bank* is helpful. But the issue here is different. Here, CPC made its objection known from the start and consistently took the position that a claim against American Trust remained viable. We do not face an analogous sit-on-your-hands scenario.¹³

C. American Trust’s Assertion That The Circuit Court At Various Times Indicated That It Was Too Late For CPC To Challenge The Receivership

¶67 A line of argument repeated in briefing and at oral argument is that the circuit court, at multiple times, indicated that it was too late for CPC to dispute the appointment of the receiver. For example, American Trust writes on appeal:

In response to CPC’s counsel’s attempt to argue that the appointment of the Receiver was somehow improper, Judge VanDeHey stated at a hearing on June 21, 2007 that “this is water over the dam. This receivership was agreed upon, or at least the sale was, and there was a time at the beginning when we had various evidentiary hearings, and it was an opportunity to object to the appointment of a receiver.”

¹² We acknowledge that *Home Bank v. Becker*, 48 Wis. 2d 1, 179 N.W.2d 855 (1970), speaks in terms of “waiver.” However, as we explain in ¶12, *supra*, *Home Bank* discusses a concept we now more clearly label “forfeiture.” Thus, we replace “waiver” with “forfeiture” in our discussion of the case.

¹³ American Trust also relies on *Gelatt v. DeDakis (In re Mader’s Store for Men, Inc.)*, 77 Wis. 2d 578, 254 N.W.2d 171 (1977). It is sufficient to say for purposes of our discussion here that *In re Mader’s* adds nothing to *Home Bank*.

These and other similar arguments and record cites are simply examples of times when the topic was different from the one we address today, such as a request to discharge Polsky or when there was a lack a clarity over whether CPC was attempting to halt the receivership or instead referencing a possible suit for damages. As to the circuit court’s “water over the dam” comment quoted above, the topic indeed was a request to discharge Polsky based on what CPC contended was mounting evidence that Polsky was biased. Indeed, the circuit court went on to state at that hearing that the derivative claim issue is “still ... out there.” And, there can be no clearer indication that the “water” the circuit court referred to was not *a claim for damages* than the fact that nearly a year later, in 2008, the court was still entertaining arguments regarding discovery relating to this very claim. *See* ¶48, *supra*.

D. Inaction Between September 2003 And August 2005

¶68 American Trust and the circuit court both point to CPC’s failure to attempt to bring a claim between September 2003 and August 2005, the latter being the time Virnich and Moores filed a motion for leave to file a derivative action. American Trust correctly points out that this means that “the Receiver remained appointed and in place for all of 2004, and most of 2005, before the Appellants tried to pursue their ‘derivative’ motion.” American Trust does not, however, actually explain why this delay supports the circuit court’s forfeiture ruling.

¶69 During an October 2003 hearing, as we have already explained, the circuit court expressed its understanding that Polsky was going to investigate a potential claim against American Trust. *See* ¶42, *supra*. As we learn from later hearings, American Trust was supplying the receivership with funding, and Polsky

prioritized the suit against Virnich and Moores. When CPC complained about Polsky’s failure to pursue a claim against American Trust, there was no discussion about whether CPC or Virnich and Moores waited too long to act. Rather, counsel for American Trust repeated that American Trust had nothing to fear from an investigation and the issue discussed with the circuit court was how such an investigation would be funded. *See* ¶44, *supra*.

¶70 On appeal, American Trust does not come to grips with these circumstances. More specifically, American Trust does not explain why we should deem CPC to have forfeited its claim given the expectations of the parties as of October 2003 or the events prior to August 2005. For example, so far as we can determine, American Trust has never argued that by a particular time it became apparent that Polsky would not or could not move against American Trust and that either CPC or Virnich and Moores failed to act promptly after that time.

E. Express Preservation Of The Right To Sue

¶71 Counsel for American Trust asserted at oral argument that the only way CPC could have preserved its right to sue American Trust for damages was to “expressly” reserve that right and for the circuit court to have agreed with the reservation of the right. Since there appears to be no authority for such a proposition in forfeiture case law, we suspect that counsel meant to make a fact-specific argument. That is, an argument that, in light of the particular facts in this case, it was necessary for CPC to make clear that it intended to preserve its right to sue for damages. We cannot reconcile this argument with the circuit court’s acknowledgment that “Virnich and Moores intended to reserve their right to file claims against [American Trust]” and the record details we recount above showing that all participants understood this intent.

F. Reliance On The Federal Court Decision

¶72 American Trust asks us to look for guidance in *Virnich v. Vorwald*, 677 F. Supp. 2d 1066 (W.D. Wis. 2009), and *Virnich v. Vorwald*, 664 F.3d 206 (7th Cir. 2011). We have reviewed both decisions and find them unhelpful.

¶73 First, the focus of both decisions is on the derivative action aspect of this case, a topic that the parties now agree is moot. The cases do not address the viability of a direct action by CPC.

¶74 Second, to the extent the federal courts analyzed the sufficiency of the pleading, no such issue is present. *See Virnich*, 664 F.3d at 212-14.

¶75 Third, to the extent the Seventh Circuit analyzed issue preclusion, the topic was whether a suit in the federal courts should be precluded by the resolution of the same issue in the state courts. *See id.* at 214-17. But of course this discussion has no application here because we are reviewing the very decision that the federal court decided had preclusive effect.

¶76 Fourth, to the extent the federal court decisions can be read as approving of the reasoning in the circuit court’s order that we review here, it should be clear by now that we disagree with that reasoning. In particular, it should be apparent by now why we find unpersuasive the Seventh Circuit’s statement that “Virnich had plenty of incentive to obtain full and fair adjudication of his allegations of impropriety in the initial action [and he] chose instead to withdraw and then to sit on those allegations in state court.” *Id.* at 217.¹⁴

¹⁴ In both briefing and during oral argument, counsel for American Trust argued that an attorney representing Virnich made a significant concession during argument before the Seventh
(continued)

IV. Alternative Arguments

A. *Judicial Estoppel*

¶77 American Trust argues that judicial estoppel provides an alternative basis to affirm. Judicial estoppel has three elements: “(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position.” *Salveson v. Douglas Cnty.*, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182. American Trust asserts that all three elements are met here. We need not address this argument in detail because American Trust’s argument fails under the first element.

¶78 American Trust refers to the element requiring that “a litigant assumes a position that is clearly inconsistent with a position it assumed in an earlier legal proceeding.” As to that element, American Trust asserts that it matters that Virnich and Moores first “agreed to the Receivership and the sale” and then, later, sought to pursue a derivative claim based on an improper receivership. But, as we have already explained, there is nothing inconsistent with Virnich and Moores doing both of these things. See ¶¶31-32, *supra*. Thus, we discern nothing “clearly inconsistent” under the first element of the judicial estoppel test.

Circuit: “Question: ‘If Polsky and Vorwald did not concoct a phony receivership, you have no case.’ Answer: ‘That’s correct, your honor.’” See *Virnich v. Vorwald*, 664 F.3d 206, 215 (7th Cir. 2011). However, this is nothing more than a statement of the obvious—that a suit against Vorwald alleging a concocted phony receivership would lack merit if there was nothing to the allegation. And, the larger context of this exchange is the Seventh Circuit’s point that the state circuit court’s order disposes of the federal issue by barring Virnich from bringing an action against American Trust and Polsky. See *id.* at 214-15.

B. Equitable Estoppel

¶79 American Trust also argues that equitable estoppel should apply. American Trust asserts that equitable estoppel applies when there is relevant “action or nonaction by one party and detrimental reliance by the other.” We reject this argument.

¶80 American Trust points to the fact that Virnich and Moores “made no effort to pursue derivative claims before 2005, and no effort to attack the Receiver before 2007, and [American Trust] obviously relied on this failure to pursue the issue in continuing the funding of the Receivership and not making any clarifying motion on their part, believing the issue of the appointment was at rest.”

¶81 This argument by American Trust falls flat for reasons we have already discussed. American Trust does not show that, given the October 2003 understanding that the receiver would pursue claims, Virnich and Moores were delinquent in waiting until August 2005 to seek leave to file a derivative action. Additionally, American Trust does not fully develop a detrimental reliance argument. In October 2003, American Trust would have known that there was at least a possibility that CPC could bring a claim for damages against American Trust. So far as the parties explain, the thing that changed in August 2005 was that Virnich and Moores sought to assert the claim derivatively. American Trust does not point to detrimental reliance that might turn on the *identity* of the person acting on behalf of the corporation.

¶82 Accordingly, we reject American Trust’s equitable estoppel argument.

Conclusion

¶83 Although our discussion above is framed primarily in terms of why we cannot affirm the circuit court’s determination that CPC forfeited its right to sue American Trust for damages, our discussion likewise demonstrates that there is no basis for determining that CPC forfeited its right to sue with respect to Polsky.

¶84 We stress once more that the underlying merit of possible suits for damages against American Trust or Polsky is not the topic today. We pass no judgment whatsoever on whether there actually are grounds to believe that either American Trust or Polsky acted improperly or, if so, whether CPC suffered financial harm as a result. These topics were sometimes relevant before the circuit court in its supervisory role over the receivership, but are not relevant for purposes of deciding whether CPC’s actions or inactions amount to forfeiture.

¶85 Consistent with the views of the parties, we dismiss this appeal as it relates to the circuit court’s decision to deny Virnich and Moores leave to file a derivative action on behalf of CPC against American Trust and Polsky because, on this topic, the appeal is moot. For the reasons discussed above, we reverse the portion of the circuit court’s order declaring that CPC has forfeited its right to bring a suit for damages against either American Trust or Polsky.

By the Court.— Appeal dismissed in part; order reversed in part.

Not recommended for publication in the official reports.

